No. 05-259

IN THE

Supreme Court of the United States

BURLINGTON NORTHERN SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters (BMWE) file this brief *amici curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-

[1] No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

CIO is a federation of 52 national and international labor organizations with a total membership of 9 million working men and women. The BMWE is a labor organization representing 31,000 maintenance of way employees on railroads throughout the United States.

STATEMENT

This case involves claims of retaliation in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.* The claimant is Sheila White, who worked as a maintenance of way employee at the Burlington Northern & Santa Fe Railway's Tennessee Yard and who was covered by a collective bargaining agreement between Burlington Northern and the Brotherhood of Maintenance of Way Employes (BMWE).

In September 1997, White complained to the roadmaster of Burlington Northern's Tennessee Yard (an upper level Railway supervisor) and to other Railway officials that her immediate supervisor was sexually harassing her. Pet. App. 4a. Shortly thereafter, White was reassigned from operating a forklift to performing road work as a standard track laborer. *Ibid.* The road work performed as a standard track laborer is less skilled, more arduous and dirtier than the work of operating a forklift. *Ibid.*

In October and December 1997, White filed charges with the Equal Employment Opportunity Commission alleging sex discrimination and retaliation in violation of Title VII. Pet. App. 5a. Shortly after filing the second set of charges, White was "removed from service" at the direction of the roadmaster of the Tennessee Yard on a charge of insubordination. *Id.* at 6a.

White challenged her removal from service through the complaint and grievance-arbitration procedures of the Burlington Northern/BMWE collective bargaining agreement

covering the Tennessee Yard. *Id.* at 7a. White also filed charges with the EEOC alleging that the Railway's action constituted retaliation. *Ibid.*

In January 1998, the hearing officer considering White's challenge to her removal from service pursuant to the procedures in the collective bargaining agreement found that White had not been insubordinate and should not have been removed from service. *Ibid.* As a result, White was returned to her standard track laborer position with back pay. *Ibid.*

White subsequently brought suit against Burlington Northern alleging sex discrimination and retaliation in violation of Title VII. Pet. App. 7a. A jury found that White's reassignment from the forklift operator position to the standard track laborer position and her removal from service were in retaliation for her complaints about sexual harassment and for her filing of charges with the EEOC. *Ibid.* The jury awarded White $43,500 in compensatory damages (including $3,250 in medical expenses) on her retaliation claims. *Ibid.* The jury's verdict was sustained by the district court on Burlington Northern's motion for judgment and by the Sixth Circuit on the Railway's appeal from the district court's ruling. *Ibid.*

SUMMARY OF ARGUMENT

Burlington Northern was found to have unlawfully discriminated against its employee, Sheila White, in violation of Title VII § 704(a) by reassigning White to a worse job and by later removing her from service. In this Court, the Railway defends by maintaining that a retaliatory reassignment to a worse job is not an adverse employer action that will support a Title VII discrimination claim and that the retaliatory removal from service was not an action attributable to the Railway. Those defenses fail.

(1) By their clear terms, Title VII's anti-discrimination provisions prohibit all employer actions that adversely affect an employee's conditions of employment taken against the

employee on the basis of (i) the employee's "race, color, religion, sex, or national origin," or (ii) the employee's opposition to unlawful discrimination. This reading of Title VII's anti-discrimination provisions is reinforced by the legislative history of the Act and by the long-standing reading of the National Labor Relations Act's and the Fair Labor Standards Act's parallel anti-discrimination provisions. Thus, the employer action of reassigning an employee to a worse job in retaliation for opposing sex discrimination and for filing charges with the EEOC constitutes unlawful discrimination in violation of Title VII §704(a).

(2) The retaliatory removal of White from service is adverse employment action for which Burlington Northern is responsible. The removal from service was ordered by an upper level Railway supervisor with authority to take such actions on behalf of the Railway. The fact that White successfully challenged the removal from service through the complaint and grievance-arbitration procedures in the applicable collective bargaining agreement does not relieve the Railway of responsibility for removing White from service in the first place, an action that resulted in her being without her sustaining income in the interim.

ARGUMENT

In this case, after a full trial, the jury found that Burlington Northern violated § 704(a) of Title VII by reassigning its employee, Sheila White, to a worse job and later removing her from service in retaliation for her complaints of sexual harassment and her filing of EEOC charges, and the jury's findings were sustained by the district court and by the *en banc* Sixth Circuit.

In this Court, Burlington Northern offers two legal defenses to White's retaliation claims. First, the Railway argues that the retaliatory reassignment of White to a worse job is not an adverse employer action that will support a Title VII discrimination claim. Pet. Br. 24-32. Second, the Railway

argues that since the applicable collective bargaining agreement provided employees a procedure through which they could challenge a removal from service, the removal of White from service was a mere preliminary action that cannot properly be attributed to the Railway, and that the decision upholding White's challenge to her removal is the only action that is properly attributable to the Railway. *Id.* at 33-42. Neither of these defenses has any legal substance.

A. Four Red Herrings.

Before taking up each of Burlington Northern's defenses—and with apologies to Dorothy L. Sayers—we begin by removing (a mere) four red herrings that might distract from a properly focused consideration of the issues before the Court at this stage of the proceedings.

First, at this juncture, this case does not present any question as to whether White had presented a sufficient *prima facie* case on her retaliation claims. White's case went to trial, and the jury—considering all of the evidence, including the Railway's proffer of a pretextual justification for her job reassignment, *see* Pet. App. 25a-26a—found that Burlington Northern had first reassigned White to a worse job and then removed her from service in retaliation for her complaints of sexual harassment and her filing of charges with the EEOC. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 & 147 (2000). Thus, this case is not one that turns on the debatable proposition that, at the *prima facie* case stage, only certain kinds of adverse employment actions are sufficient, in and of themselves, to raise an inference of retaliatory motive. *See* White, *De Minimis Discrimination*, 47 Emory L.J. 1121, 1142 (1998) ("courts requiring adverse action only for a prima facie case presumably do so because plaintiff has failed to raise an inference of unlawful intent, not in the face of an assumed or proven motivation").

Second, there is no question that Burlington Northern itself is directly responsible for reassigning White to a worse job and for removing her from service. Both actions were found to have been carried out at the direction of the roadmaster for the Railway's Tennessee Yard, who acted within the scope of his authority as the upper level Railway supervisor at that facility. Pet. App. 4a & 6a. Title VII defines the term "employer" to include "any agent" of an employer. 42 U.S.C. § 2000e(b). And, an employer's upper level supervisor exercising his supervisory authority to reassign a subordinate employee to a worse job or to remove such an employee from service is most certainly acting as an agent of the employer. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762-763 (1998) ("Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates," and thus "a tangible employment action taken by a supervisor becomes for Title VII purposes the act of the employer.").

Third, there is no question that the retaliatory reassignment to a worse job and the retaliatory removal from service at issue here related to White's terms, conditions and privileges of employment. Thus, this case does not raise any issue of whether Title VII § 704(a) (which prohibits retaliatory "discriminat[ion] against any . . . employee[]") also reaches employer actions that are *unrelated* to employment and whether §704(a) is, in that sense, broader than Title VII §703(a)(1) (which prohibits racial and sexual "discriminat[ion] against any individual with respect to his . . . conditions . . . of employment"). *See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). (construing the similar anti-retaliation provision in the National Labor Relations Act to reach baseless retaliatory lawsuits).

Fourth, Burlington Northern's defense regarding White's removal from service does *not* implicate the question of whether White is precluded by the grievance-arbitration procedures of the applicable collective bargaining agreement

from pursuing her Title VII claim in court. It is, to begin with, far from clear that a collective bargaining agreement's grievance-arbitration provision can ever constitute a waiver of a covered employee's right to pursue a Title VII claim in court. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974). But even assuming that it could, in order to effectively waive such rights "the collective-bargaining agreement" would have to "contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination." *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 (1998). The applicable collective bargaining agreement here contains *no* such clear and unmistakable waiver. As a general matter, collectively bargained grievance-arbitration procedures in the railroad industry "pertain[] only to disputes invoking contract-based rights." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 254 (1994). And, the collective bargaining agreement here is within that standard mode, making not the slightest reference to the arbitration of statutory claims.

With those potential distractions put to one side, we now return to the separate defenses offered by Burlington Northern to White's separate claims of unlawful retaliation.

B. The Retaliatory Reassignment Claim.

Burlington Northern argues that the Railway's retaliatory reassignment of White as a standard track laborer performing road work is not an adverse employer action that will support a Title VII discrimination claim. Pet. Br. 24-32.

In advancing this argument, Burlington Northern does not contest the findings of the jury, sustained on appeal, that the road work performed by a standard track laborer is less skilled, more arduous and dirtier than operating a forklift. *See Exxon Co, U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) ("concurrent findings of fact by two courts below" will not be reviewed "in the absence of a very obvious and exceptional showing of error"). Indeed, the Railway's explanation for

reassigning White from operating the forklift to performing road work—an explanation found to be pretextual by the jury—was that employees with more seniority than White complained about her having been assigned to the more desirable forklift operator job. Pet. App. 4a-5a.

Rather, the Railway's argument is that retaliatory reassignments to a worse job that entails performing less skilled, more arduous and dirtier work—in contrast to retaliatory reassignments to a lower paying job or to a lower classified job—do not constitute unlawful "discrimination" within the meaning of Title VII. Pet. Br. 27. That artificial limitation on what constitutes Title VII "discrimination" is unsound.

Section 703(a)(1) of Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). And, § 704(a) makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . ., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

It is evident, then, that the phrase "discriminate against" should be accorded the same meaning in both § 703(a)(1) and § 704(a). *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (normally "identical words used in different parts of the same act are intended to have the same meaning").[2]

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[2] So that we are not misunderstood, this is not to say that, in light of their different terms and regulatory purposes, the two provisions are identical in scope regarding adverse employer actions that are unrelated to the employee's conditions of employment. *See* p. 6, *supra* (third red herring). But since this case does involve adverse employer action related to White's conditions of employment, any such difference in scope is not at issue here.

Indeed, the Railway embraces—and belabors for many pages of its brief—this basic point. Pet. Br. 13-21.

In common usage, the word "discriminate" means "[t]o make a clear distinction: differentiate" or "[t]o act on the basis of prejudice." *Webster's II: New College Dictionary* 325 (1999). And, this is precisely the meaning attributed to that word by the sponsors of Title VII. Thus, Senator Clark, one of the Senate floor managers in 1964, responded to an inquiry from Senator Dirksen, the Senate minority leader, concerning the meaning of the word "discriminate" as follows:

> "To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex or national origin); any other criteria or qualification is untouched by this bill." 110 Cong. Rec. 7218 (1964).

Senator Clark added that "[d]iscrimination is a word which . . . has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act." 110 Cong. Rec. 7218 (1964). At the time Senator Clark made this comparison, the word "discriminate" had a well-established meaning under the NLRA and the FLSA that accorded with the common sense meaning attributed to that word by Senator Clark.

In this regard, NLRA § 8(a)(3) makes it "an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). And, NLRA § 8(a)(4) makes it "an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4). These two sections of the NLRA are thus worded similarly to §§ 703(a)(1) and 704(a) of Title VII.

From the beginning, the National Labor Relations Board has explained the prohibition on discrimination contained in NLRA § 8(3)—the predecessor to § 8(a)(3)—in the following terms:

> "As interpreted by the Board, this section is not intended to interfere generally with the freedom of an employer to hire and discharge as he pleases. It limits this freedom, however, in one important respect. He may not use it in such a manner as to foster or hinder the growth of a labor organization. He may employ anyone or no one; he may transfer employees from task to task within the plant as he sees fit; he may discharge them in the interest of efficiency or from personal animosity or sheer caprice. But, in making these decisions he must not differentiate between one of his employees and another, or between his actual and his potential employees, in such a manner as to encourage or to discourage membership in a labor organization." *First Annual Report of the NLRB* 77 (1936).

The Board has therefore held that "assigning [union member employees] more onerous and less agreeable work" constitutes "discriminat[ion] against" those employees "in violation of Section 8(a)(1) and (3) of the Act." *Park Inn Hotel, Inc.*, 139 NLRB 669, 685 (1962). *See also Meyer & Welch, Inc.*, 96 NLRB 236, 244 (1951) (Reassignment to "dirty, disagreeable, more onerous, and less desirable" job constituted "discrimination" within the meaning of NLRA § 8(a)(3) & (4), even though the reassignment "resulted in no reduction in wage rates, change in hours of work, or other conditions of employment."). As the Board has stressed, it is "the operative factors which prompted the discrimination," and not the "degree of the [employer's] discrimination," that is determinative in § 8(a)(3) cases. *Ontario Foods, Inc.*, 144 NLRB 1057, 1059 (1963).

FLSA § 15(a)(3), that Act's anti-discrimination provision, had been interpreted in the same manner.[3] For example, in *Mitchell v. DeMario Jewelry, Inc.*, the district court found that the employer violated FLSA § 15(a)(3) by "discriminating against [FLSA-plaintiff] employees . . . in several ways including the changing of seating arrangements of the[] employees . . ., giving them less desirable locations or positions in the plant, changing the particular type of work assigned to them, giving instructions that they were not to leave their seats except to go to the restroom and generally finding fault with their work." 180 F.Supp. 800, 801-802 (M.D. Ga. 1957), *aff'd on other grounds*, 361 U.S. 288 (1960).

This Court has often "drawn analogies to the NLRA in [construing] Title VII," and "[t]he meaning of this analogous language [in the NLRA] sheds light on the Title VII provision at issue here." *Hishon*, 467 U.S. at 76 n. 8. Reading Title VII against the background provided by the settled interpretation of the NLRA's anti-discrimination provisions (as well as the FLSA anti-discrimination provision), it is clear that what both the NLRA and Title VII prohibit is for an employer to "differentiate between one of his employees and another" on an improper basis in taking such employer actions as "transfer[ring] employees task to task" or "discharging" employees. *First Annual Report of the NLRB*, 77.

There can be no doubt, then, that it would be unlawful "discrimination" under § 703(a)(1) for an employer, on the basis of "race, color, [and] sex," to refuse to assign racial minorities and women to a better job, like the folk lift operator job, and to assign them only to worse jobs, like the less

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[3] FLSA § 15(a)(3) makes "it unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3).

skilled, more arduous and dirtier standard track laborer's road work job. *See Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) ("An employer may provide its employees with many benefits that it is under no obligation to furnish," but such "benefit[s] . . . may not be doled out in a discriminatory fashion."). It follows ineluctably that making such assignments on the basis that an employee has complained about sexual harassment or filed EEOC charges does constitute unlawful "discrimination" in violation of § 704(a).

Simply stated, "assigning [employees] more onerous and less agreeable work" on an improper basis is most certainly unlawful "discrimination against" those employees. *Park Inn Hotel*, 139 NLRB at 685. In that regard, the jury's findings that White's reassignment was in retaliation for her complaints about sexual harassment and her filing of EEOC charges and that the reassignment worked "a materially adverse change in the terms or conditions of employment," JA 63, is more than sufficient to establish that Burlington Northern unlawfully "discriminate[d] against" White in violation of § 704(a).

C. The Retaliatory Removal from Service Claim.

Burlington Northern argues, too, that "White's temporary removal from service . . . is not actionable" on the ground that "[t]he initial investigatory suspension was not the official decision of the company under the terms of the CBA, and the action that is properly attributable to the company—*viz.*, rescinding the suspension and awarding back pay—did not adversely affect the compensation, terms, conditions or privileges of White's employment." Pet. Br. 33-34. In other words, Burlington Northern's position is that the only action attributable to the Railway is rescinding White's "removal from service" with back pay and that the action of wrongfully removing White from service and leaving her without her sustaining income in the interim, thereby causing her over

$40,000 in compensatory damages, is attributable to some nameless third party.

To begin, no matter how a collective bargaining agreement is drafted, the agreement's terms cannot override the Title VII rule that when a supervisory agent of an employer—acting within the scope of his authority as such—unlawfully discriminates against an employee in violation of Title VII, the *employer* has committed "an unlawful employment practice." That self-evident proposition is fully sufficient to refute Burlington Northern's attempt to evade legal responsibility for the retaliatory removal of White from service. And, beyond that, the applicable collective bargaining agreement does not attempt to override Title VII in the manner asserted by the Railway.

The basic premise of Burlington Northern's defense is the fiction that "the railroad and the union have agreed upon a procedure for the railroad to investigate any tentative disciplinary action," which is "separate and apart from—and prior to—the invocation of grievance procedures." Pet. Br. 5 & 6. Starting from this fiction, the Railway reasons that it cannot be deemed to have taken any adverse action against an employee until that procedure is completed. This syllogism fails at its first step, because the Railway's premise is wrong.

What the applicable collective bargaining agreement in fact provides is a procedure by which "[a]n employe who . . . has been . . . disciplined or dismissed" can lodge a "complaint" that she "has been unfairly disciplined or dismissed, or [otherwise] unjustly treated." Rule 91(b), JA 56. If a "disciplined or dismissed" employee does not file a "complaint" challenging the Railway's action "within 15 days from date of discipline, dismissal or alleged unjust treatment," she is foreclosed from challenging the action through the procedures provided by the collective bargaining agreement. Rule 91(b)(1) & (8), JA 56-57.

Thus, where, as here, the discipline takes the form of "removal from service," an employee's failure to file a timely complaint means that the "removal from service" will be permanent, i.e., the employee is permanently dismissed from Burlington Northern's employment. Pet. App. 6a ("the suspension without pay would automatically become a termination if White did not file a grievance with her union appealing the decision within fifteen days") & 119a ("evidence at trial showed that the suspension was without pay and that termination would have resulted but for the intervention of the union").

The applicable collective bargaining agreement further provides that—where an employee does complain—in "the handling of his complaint," the "employe may be represented by [a] duly accredited representative of the Brotherhood of Maintenance of Way Employes." Rule 91(b)(3), JA 56. As part of the "fair and impartial investigation" into the employee's complaint, the employee (and the union on the employee's behalf) has the right to present witnesses before an employer-appointed hearing officer, who will decide whether to sustain the charges on which the discipline was based. Rule 91(b)(3) & (5), JA 56-57.

The collective bargaining agreement adds that the decision of a hearing officer on an employee complaint alleging unjust or unfair discipline may be appealed through the normal procedures for resolving grievances under the agreement. Rule 91(b)(7) & (8), JA 57. The appeal through the grievance-arbitration procedures is based on the record established before the employer-appointed hearing officer on the investigation into the employee's complaint. *See* Rule 1(d), National Railroad Adjustment Board Uniform Rules of Procedure (June 23, 2003), available at www.nmb.gov. And, "the hearing officer" is charged with being "unimpeachably objective and unbiased in the development of fact." NRAB

Third Division Award No. 20014 (1973), available at www.nmb.gov.

"The [National Railroad Adjustment] Board does not conduct an evidentiary hearing but reviews an administrative record that is created during the grievance handling procedure set forth in the applicable collective bargaining agreement. In discipline cases, the record generally includes a fully transcribed hearing with witnesses and documentary evidence presented before a carrier official acting as the hearing officer." Abram, *et al.*, eds., *The Railway Labor Act* 407 (2d ed. 2005) (footnote omitted).

The sum of the matter is this: What the applicable collective bargaining agreement provides is a procedure by which "[a]n employe who . . . has been . . . disciplined or dismissed" may file a "complaint" challenging that action by Burlington Northern. Contrary to the Railway's brief, the agreement does *not* speak in terms of "tentative disciplinary action." Pet. Br. 5. Rather, the agreement speaks in terms of "discipline[]" that "has been" imposed. Moreover, the Railway's assertion that the "procedure . . . to investigate" a complaint of unjust discipline is "separate and apart from" the "grievance procedures," Pet. Br. 6, is seriously misleading. The investigation is an essential first step in the grievance procedure during which the record is established for all subsequent steps, including arbitration. Because "[s]ubsequent post-hearing phases proceed . . . based on the record established during the on-property [investigative] stage," those phases "closely resemble an appellate proceeding." *The Railway Labor Act* 407-408.

Finally, to put the forgoing in perspective, it is noteworthy that the procedure established by the applicable collective bargaining agreement is not typical of the railroad industry or even of the other agreements between Burlington Northern and the BMWE. The norm in the industry is that, absent a safety hazard or gross misconduct (of a kind plainly not

present in this case), an employee may *not* be removed from service until *after* the employee has been given written notice of the specific charges against him and *after* a decision has been rendered on the basis of a "fair and impartial investigation" into those charges. *See* NRAB Third Div. Award No. 21447 (1977), available at www.nmb.gov. The applicable collective bargaining agreement stems from an agreement the BMWE negotiated with the St. Louis-San Francisco Railway before that railroad merged with the Burlington Northern. By contrast, the collective bargaining agreement covering the core segment of the workforce—i.e., the agree

ment originally negotiated between the BMWE and the Burlington Northern Railway—contains removal from service requirements that are in line with the industry norm. *See* Special Board of Adjustment No. 1112 Award No. 60, pp. 6-7 (2003).[4]

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[4] Rule 40 of that agreement provides in pertinent part:

> A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule.
>
> B. In the case of an employe who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefor.
>
> C. At least five (5) days advance written notice of the investigation shall be given the employe and the appropriate local organization representative, in order that the employe may arrange for representation by a duly authorized representative or an employe of his choice, and for presence of necessary witnesses he may desire.

If the applicable collective bargaining agreement had followed the normal pattern, Burlington Northern would, in fact, not have taken any action to remove White from service until after a hearing officer rendered his decision on the basis of a fair and impartial investigation. At the same time, if the agreement here had followed the normal pattern, White would not have been subject to removal from service until a hearing officer decision was rendered, and she would not have been out of work or without income pending the decision.

The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employe involved.

D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employe, with copy to local organization's representative. If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employe. If not effected within five (5) calendar days, or if employe is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be canceled.

E. The employe and the duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.

F. The investigation provided for herein may be waived by the employe provided that any discipline assessed is confirmed in writing in the presence of his duly authorized representative and agreed to by the proper officer of the Carrier.

G. If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.

CONCLUSION

The judgment of the courts below should be affirmed.

Respectfully submitted,

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